U.S. Department of Labor

Office of Administrative Law Judges
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Mailed 2/26/01

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IN THE MATTER OF:              *
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Joan M. DeWick,                *
Widow of William D. DeWick     *
     Claimant                  *
                               *
          Against              * Case No.: 2000-LHC-803
                               *
General Dynamics Corporation       * OWCP No.: 1-144148
     Employer/Self-Insurer     *
                               *
          and                  *
                               *
Director, Office of Workers'       *
Compensation Programs          *
U.S. Department of Labor           *
     Party-in-Interest         *
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APPEARANCES:

Carolyn P. Kelly, Esq.
Matthew Shafner, Esq.
For the Claimant

James T. Hornstein, Esq.
For the Employer/Self-Insurer

Merle D. Hyman, Esq.
Senior Trial Attorney
For the Director

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on September 1, 2000 in New London,

Connecticut, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit and RX for an exhibit offered by the Employer/Carrier. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
CX 16	Notice Relating to the Taking of the Deposition of Robert Hutchinson	10/20/00
RX 9	Attorney Hornstein's letter requesting a subpoena to be served on Dr. Stephen Powell	10/24/00
ALJ EX 13	This Court's letter sending the subpoena to counsel	10/25/00
CX 17	Attorney Shafner's letter filing the	12/01/00
CX 18	November 9, 2000 Deposition Testimony of Robert Hutchinson	12/01/00
RX 10	Attorney Hornstein's letter filing the	12/14/00
RX 11	October 16, 2000 Deposition Testimony of Dr. Powell	12/14/00
CX 19	Attorney Shafner's letter filing a status report	12/18/00
ALJ EX 14	This Court's **ORDER** confirming the post-hearing schedule	12/19/00
RX 12	Attorney Hornstein's letter filing the	12/27/00
RX 13	June 26, 2000 report of Dr. Powell, as well as the	12/27/00

RX 14	June 9, 2000 report of Dr. Powell	12/27/00
CX 20	Attorney Kelly's letter filing	01/02/01
CX 21	Claimant's post-hearing brief	01/02/01
RX 15	Attorney Hornstein's letter filing	01/17/01
RX 16	Employer's brief	01/17/01
CX 21A	Attorney Shafner's letter requesting the opportunity to file a reply brief to the Employer's late-filed brief[1]	01/23/01
ALJ EX 15	This Court's **ORDER** granting the request	01/24/01
RX 17	Attorney Hornstein's letter requesting the opportunity to file a reply to the reply brief. The request was granted.	01/25/01
CX 22	Attorney Kelly's letter filing	02/05/01
CX 23	Claimant's reply brief	02/05/01
RX 18	Employer's reply brief	02/21/01

The record was closed on February 21, 2001 as no further documents were filed.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to this proceeding.

2. Decedent and the Employer were in an employee-employer relationship at the relevant times.

3. Claimant alleges that her husband suffered an injury on October 20, 1995 in the course and scope of his employment.

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[1]Henceforth, Employer's brief must be simultaneously filed on the date agreed to by both sides.

4. Claimant gave the Employer notice of the injury and death in a timely fashion.

5. Claimant filed a timely claim for compensation and the Employer filed a timely notice of controversion on or about June 29, 1998.

6. The parties attended an informal conference on December 15, 1999.

7. The applicable average weekly wage is $790.84.

8. The Employer has paid no benefits on either claim herein.

The unresolved issues in this proceeding are:

1. The fact of injury.

2. Whether Decedent’s lung cancer constitutes a work-related injury.

3. If so, the nature and extent of Decedent's disability.

4. The date of his maximum medical improvement.

5. Claimant’s entitlement to Death Benefits if Decedent died of his work-related injury.

6. Entitlement to an award of medical benefits and interest on any unpaid compensation or Death Benefits.

Summary of the Evidence

William D. DeWick, who was born on September 2, 1937 and who had a high school education, enlisted in the U.S. Navy at age 18 in November of 1955, serving honorably for twenty years. Upon his discharge in May of 1975, he went to work for eighteen months at the U.S. Navy Post Exchange in Groton, Connecticut and then he began working on October 25, 1975 as an STO Test Mechanic at the Groton, Connecticut shipyard of the Electric Boat Company, a division of the General Dynamics Corporation (“Employer”), a maritime facility adjacent to the navigable waters of the Thames River where the Employer builds, repairs and overhauls submarines.
He remained in that job classification until November 30, 1995, at which time he took an early retirement at age 58. (CX 2) During Decedent’s service in the U.S. Navy he received numerous letters of commendation and these are in evidence as CX 5 and 1-10.

Joan M. DeWick ("Claimant" herein), who was born on April 21, 1945 (CX 11) and who married the Decedent on July 24, 1982 (CX 10), testified herein by deposition on November 8, 1999 and Claimant testified that she met Decedent seven (7) months before their marriage, that he was a Chief Petty Officer at the time of his discharge from the U.S. Navy, that he "work(ed) in the engine rooms, whatever they gave him to do in the Navy," and that she did not know whether he had been exposed to asbestos while serving in the Navy. According to Claimant, Decedent worked at the shipyard as "a test technician for STO," that his duties involved, **inter alia**, testing the tubes and "(a)nything that was already done, he had to go back and make sure it was right. He was the last one to check everything, make sure everything's all right." Claimant really did not know much about her husband's work because "(t)here's a lot of things he didn't tell me because (his work) was secretive." She also did not know whether he had been exposed to asbestos while working at the shipyard because "(w)e never discussed it," although "he did say that there was a lot of fumes and dust" in his work environment, and "his clothes were dusty when he came home" from work. (RX 8 at 3-8)

Decedent "was through working in July (of 1995) because he had been sick, and his final time was November 1st ... his retirement date." Decedent's sickness "started out with a cold and it turned into bronchitis and he just couldn't get rid of it." Decedent took an early retirement, the so-called "golden handshake." He did not work anywhere else after he left the shipyard. Decedent had received only his U.S. Navy pension but no disability from the Veterans Administration. Dr. Steven Curland was Decedent's family doctor at least since 1982. (RX 8 at 8-9)

Decedent began experiencing breathing problems in July of 1995, at which time he "had the bronchitis, the cold he just couldn't shake, so that's why he went to the doctor," who referred Decedent to Dr. Steven Powell, a pulmonary specialist. Dr. Dhami, Dr. Jagathambal and Dr. Slater were Decedent's oncologists. Decedent's chest x-rays showed "the spot" and they called us immediately when we got home and told him to get into the hospital because they wanted to do a CAT scan because he had cancer." He was admitted to the W W Bachus Hospital for about four (4) days in October of 1995, and he was later admitted for one week of chemotherapy. After that treatment course was completed, Decedent was brought to the Emergency Room three or four times "because he couldn't breathe and he was having "chest and abdominal) pains." He had no breathing problems or chest or abdominal pains prior to July of 1995. Prior to that time Decedent had no other medical problems. Decedent smoked cigarettes for about forty years and he passed away on July 29, 1996, at age 58. Decedent and his wife were told by the doctors

that he had cancer but they were not told what caused it. (**Id.** at 9-15)

The parties deposed Michael J. Haney on September 27, 1999 (CX 9) and Mr. Haney, who has worked at the shipyard since December 23, 1974, worked as a welder until about thirty (30) months before his deposition, at which time he was laid-off and retained in employment as a senior draftsman. Mr. Haney testified that his work at the shipyard exposed him to asbestos dust and fibers until at least 1977, that it "was approximately (around) that time that they started to get rid of asbestos and go into (or use a substitute material called) Refacil," "a type of fiberglass that replaced the asbestos for protection from burning stuff." Mr. Haney used asbestos to cover and protect components or machinery from being burned by welding sparks; he even used asbestos as a covering around his arms to prevent arm burns; he also would "cut a big piece and use it as a pancho (sic) if (he) were welding in the overhead position" to prevent welding sparks from falling down on him. He also worked in close proximity to pipe laggers who were cutting asbestos and applying it as insulation around the pipes. Mr. Haney further testified that overhaul work – - involving the ripping out of old asbestos and replacing it with fiberglass material – - was especially dirty work because one could see asbestos dust and fibers floating around the ambient air of the work environment "many times." In his early days at the shipyard Mr. Haney did not use a respirator, ear plugs or other safety devices but then in the early 1980s those devices were made available to him, as a worker "of the new school." (CX 9 at 5-16)

Raymond W. King, who also served in the U.S. Navy until January of 1968, was hired on April 1, 1968 at the Employer's shipyard in the STO Department and he first met Decedent in 1976 when he was hired. He and Decedent worked together in the same areas numerous times on the overhaul of already commissioned submarines and he testified that hypostatic testing, for example, of a component caused asbestos dust and fibers to float around the ambient air of the engine room after the asbestos covering was cut by a knife. He and Decedent were exposed to asbestos when they worked in close proximity to the pipe laggers and other trades who were cutting and applying asbestos. Face masks of the cloth variety were not provided until the late 1970s or the early 1980s. (TR 57-67)

Mr. King retired from the shipyard on December 31, 1995 as a result of the so-called "golden handshake." He worked in STO all of the time at the shipyard except for the four months he worked in Nuclear OSM in lieu of a lay off. While asbestos was not used on new construction "(s)omewhere around '73-'74," asbestos was still being removed from submarines being overhauled and Decedent "was mainly in overhauls during (those)

periods" after Decedent was hired in 1976. Decedent was also exposed to asbestos whenever he went on board the Blue Nose barge or the YTT barge, and for awhile the STO technicians worked out of the YTT barge. (TR 67-76, 91)

Richard W. Sapieha, who also worked at the shipyard from 1973 until 1989 as a structural or pipe welder, testified that he "worked mostly all new construction" but he also worked on several overhauls. According to Mr. Sapieha, "all welders used the asbestos sheets that we cut off and we used them for blankets because the metal was too hot ... we used them for supports and in tanks." Asbestos sheets were used throughout the boats wherever needed until at least the late 1970s when the shipyard started using fiberglass as insulation. However, asbestos was still occasionally used around high heat temperature but the workers had to sign out for the HY 80. Welders also worked in close proximity to the other trades, including STO technicians who were performing their assigned duties. He agreed that there was asbestos also on both barges. (TR 76-83)

Paul D. Sanford, who currently works at the shipyard as a supervisor for Department 272, STO, testified that he was Decedent's supervisor, that he first worked with Decedent in 1979, at which time he was hired, that he (Mr. Sanford) has "never seen airborne asbestos at Electric Boat," that he has "never seen anybody removing or working with asbestos, other than (those) gaskets that were impregnated with asbestos," although he remarked that he could not testify about the conditions at the shipyard prior to his hiring in November 1979. (TR 83-96)

William P. Heuer, who is employed currently as a test supervisor and who has worked at the shipyard since June of 1965, testified that he observed asbestos being used on the boats from 1965 through 1970, that he saw asbestos being removed from submarines being overhauled, that this so-called rip-out is an especially dirty procedure, that Decedent would not be involved in removing the lagging when he was hired in late 1976, but that he "could be in the compartment that they (were) doing it," that not much protective face gear was utilized at that time, although paper or cloth face masks were available at a later point in time. (TR 96-100)

Mr. Heuer, who was called as rebuttal by Claimant for additional testimony, testified that he worked several weeks on the construction of the **U.S.S. Nautilus,** the first nuclear-powered submarine, but not on its later overhaul, that he did work on the **U.S.S. Annapolis,** a submarine of the 688 Class and that much asbestos was used on the turbines, generators, pipes and other components of the submarines built in the 1960s and

that this asbestos had to be removed as part of that submarine's overhaul process. (TR 101-106)

The parties deposed Robert Hutchinson on November 9, 2000 and the transcript of his testimony is in evidence as CX 18. Mr. Hutchinson worked for Electric Boat from 1958 until he retired in 1998 or 1999. (CX 18 at 3) Three or four months after he began at Electric Boat, he was transferred into the Shipyard Test Organization (the STO). He worked on both new construction and overhaul. Up until the 1980s he had occasion to work with or near other trades using asbestos products, such as pipe insulation, gaskets for pipes and ceiling pipe flanges. (**Id.** at 5) He said that the typical STO worker would be using the asbestos products in the 1970s and would be using flextallic gaskets into the 1980s. (**Id**. at 6) When Hutchinson worked in either the reactor compartment or the engine room, asbestos dust was visible as floating particles. (**Id**. at 7) The STO people worked alongside the pipelaggers onboard the submarines and would do so when the laggers were removing asbestos during the overhaul process. (**Id**. at 8) On occasion, the STO people would remove the lagging themselves. (**Id**. at 9) Mr. Hutchinson stated that in order to perform hydrostatic testing, the STO technician was required to remove the asbestos gaskets which if they were old, would crumble and would have to be picked out piece by piece. (**Id**. at 10,11)

While Mr. Hutchinson did not know Mr. DeWick personally, he stated that a worker would have had more exposure if he had worked in the engine room or reactor areas. (**Id**. at 12) Hutchinson was familiar with the Navy's practice of having its crews participate in the construction overhaul process so they would be familiar with what was going on in their boats. (**Id**. at 13) His experience was that naval personnel working in the engine room in the 1950s and 1960s would have been exposed to asbestos as a normal part of their duties. (**Id**. at 14)

In the 1990s Electric Boat instructed STO people in asbestos removal for those times when they were removing asbestos gaskets. (**Id**.)

In his June 9, 2000 report, Dr. Steven L. Powell, a pulmonary specialist, stated as follows (CX 13)

> I have reviewed Mr. DeWick's records from five years ago. He clearly had a history of significant asbestos exposure and did, in fact, die of a lung carcinoma. It is safe to assume that the asbestos is one of the direct causes of his lung carcinoma and contributed to his death.

Dr. David G. Kern, a noted pulmonary specialist, issued the following supplemental report on July 1, 2000 to clarify his June 28, 2000 deposition testimony (CX 14, CX 15):

As I mentioned to you a few hours after I was deposed in the above matter on June 28, 2000, I made an erroneous statement during the deposition when interpreting the results of a recent article by Richard Hubbard and colleagues (Lung cancer and cryptogenic fibrosing alveolitis: a population - based cohort study. **AJRCCM** 2000;161:5-8). In the course of discussing why I believe that sufficiently intense occupational exposure to asbestos, even in the absence of asbestosis, should be considered a sufficient cause of lung cancer, I digressed to comment on the more general issue of pulmonary fibrosis as a risk factor for lung cancer. In reviewing the evolution of scientific knowledge on this latter issue, I noted that the risk of lung cancer in individuals with asbestosis was much greater than the proposed risk of lung cancer in individuals with idiopathic pulmonary fibrosis (IPF). While indeed this has been considered true in the past, in then referring to the recent elegant article by Hubbard, I erred in implying that this latter study was supportive of this position. In fact, Hubbard et al reported a risk of lung cancer in IPF seven times higher than the lung cancer risk in a control population. The magnitude of this increased risk is comparable to that observed both in occupationally exposed asbestos workers and others with asbestosis. As noted in an accompanying editorial by Jonathan Samet, M.D., the Hubbard study will not be the last word on this issue given the conflicting findings of the few studies of this question and the methodological weaknesses in all the published studies. Nevertheless, at the present time, I cannot reasonably argue that the risk of lung cancer in individuals suffering from asbestosis is substantially greater than the risk in those with IPF. The remainder of the comments I made during the deposition stand.

Dr. J. Bernard L. Gee, also a noted pulmonary specialist, sent the following letter to the Employer on November 16, 1999 (RX 1):

“This unfortunate gentleman died on 7/29/96 from metastatic lung cancer.

“Before 10/20/95, medical history was unremarkable, at which time he noted SOB, weight loss. Chest X-ray revealed a RVL mass and CT scan indicated lesions compatible with hepatic metastases. Initial bronchial biopsy was non-diagnostic but liver biopsy a metastatic large cell cancer. However, later bronchoscopy showed external compression of RUL bronchus, RUL collapse and a widened carina. He was treated with bronchodilators, chemotherapy (Taxol and cis-platinum, etc.). No

rales were noted in the L. lung, but a pneumonic episode occurred by 4/15/96. The liver lesions progressed. No PFTs in record

X-rays: Show above described mass, etc. but no interstitial or L. sided pleural disease. By 7/11/96, a L. lung mass and a lingular nodule appeared.

Family History: Father died from lung cancer.

Exposure History: Worked at EB as STO technician from 1976-1995 and served in U.S. Navy for which no further details are provided. Smoked 3-4 ppd for 40 years is noted in record on several occasions i.e. 120-160 pack years!

Opinion:

As regards the lung cancer:

a. This cancer should be ascribed to smoking, at least 100 pack/years; implying at least a 80 fold lung cancer risk. The studies of Wynder (ACS) noted in Surgeon General's report give a relative lung cancer risk of at least 60 fold at 60 pack years. This effect is enhanced by the use of non - filters. These views are set forth by Shopland (**JCNI** 83, 1142, 1991) and a recent NIH (**NCI**) publication 97-4213, 1987. The harmful effects of tar contents are addressed by Zang and Wynder (**Cancer**; 70-69, 1995).

b. By contrast, the risk of lung cancer in "asbestos workers" without smoking adjustments, in the latest Selikoff report on heavily asbestos exposed and heavy smoking insulators is 3 and similar in the large recent British studies (**HSE**). After smoking adjustment, employing an estimated overall smoking relative risk lung cancer of only 20, the **HSE** report indicates a risk of 2 or less, in a series with both asbestosis and mesothelioma. The above figures are overall results in which insulators and historical construction workers are included. We stress that many subgroups of asbestos workers show little or no excess lung cancers. For instance nontextile chrysotile using workers show no risk! This is set forth in the **Ann. Occ. Hygiene** reports which includes a summary of the data on friction product workers who show NO excess lung cancers. Other studies indicate a threshold below which no excess lung cancers occur as in the Morgan and Gee chapter and the writings of Browne. This threshold effect precludes a linear extrapolation from high exposure to low level asbestos exposure.

c. As regard asbestosis and lung cancer, I believe there are sound reasons for this association rather than the notion

that asbestos "exposure" directly causes lung cancer. These are again summarized in our chapter and include the following considerations. **First**, the excess lung cancers occur in those with abnormal chest radiographs. **Second**, in studies conducted at Yale - there is an association between the inflammatory cells in the aveoli and the para-neoplastic squamous metaplasia observed by bronchial biopsy in asbestos workers. **Third**, asbestos fibers certainly produce both cell growth stimulating factors and carcinogenic oxidizing free radicals.
Fourth, asbestos fibers predominate in the bronchiolar-alveolar tissues with few in the large airways (Churg, **BJIM**, 501355, 1993) where many lung cancers arise. **Fifth**, the greatest excess lung cancer occurs in cohorts with much asbestosis. **Sixth**, there is directly relevant evidence from three pathology studies. The two retrospective studies showed that in cases with lung cancer, 90-100% showed pulmonary asbestosis (Kipen, **BJIM** 44-96, 1987) leaving no room for any cases without asbestosis among the remaining workers (Newhouse, **BJM**, 42:4, 1985). More importantly Sluis Cremer found in a prospective study that without autopsy evidence of asbestosis, there was no statistical evidence of an excess lung cancer and that risk paralleled the severity of the asbestosis (**BJM**, 46:537, 1993). **Seventh**, there is little or no evidence in the Quebec population living around the asbestos mines of an increased lung cancer risk in spite of the local ambient air containing fiber levels several hundred fold higher than those of N. America urban dwellers (McDonald **Env. Health Perspec.** 62:319, 1985) and Camus (**NEJM**)

d. As regards synergism between smoking and lung cancer, this was an historic notion based on a few cohorts in which statisticians usually stated "synergism cannot be excluded'. Of itself, this is hardly proof. Moreover, it applies only to few historic cohorts, but not to most older studies. It requires for its validity an accurate knowledge of the lung cancer risks in life-long non-smokers; such data, Berry notwithstanding, does not exist because, as Selikoff pointed out in 1972 - he had never seen lung cancer in non - smokers! Furthermore, current data simply does not support the synergism notion, through it is reasonable to regard asbestosis and smoking as "co-conspirators". Dr. Selikoff’s report of synergism (3/12/89) was doubtful when first proposed by Selikoff in 1965. It is no longer valid and should not be cited as relevant to the contemporary scene.

e. The EB asbestos exposure in this case appears to be light - indeed how much chrysotile was used or remained at EB after 1976? Further, there is no evidence of asbestos related

pleuro-pulmonary changes, implying no to light asbestos exposure. Again, the EB asbestos exposure latency for this lung cancer is acceptable but distinctly short at 19 years, a contrast with 40 years smoking latency. Indeed, the smoking risk rises as smoking is prolonged. (Gee Ind. Built Environ 8: 32-5 1999).

To conclude. I consider this lung cancer should be ascribed to smoking and asbestos exposure was not a factor, but familial factors are also relevant by increasing lung cancer risk.

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible witnesses, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the

statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862

(1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that her husband experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by “substantial evidence to the contrary” offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not “play a significant role” in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because

the testimony did not negate the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which negates the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir.

1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP,** 153 F.3d 1051, **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his asbestosis and carcinoma of the lung, resulted from his exposure to and inhalation of asbestos at the Employer's shipyard. The Employer has introduced substantial evidence severing the connection between such harm and Claimant's maritime employment. Thus, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate all of the record evidence.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or

aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

In occupational disease cases, there is no "injury" until the accumulated effects of the harmful substance manifest themselves and claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied**, 350 U.S. 913 (1955). **Thorud v. Brady-Hamilton Stevedore Company, et al.**, 18 BRBS 232 (1987); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981). Nor does the Act require that the injury be traceable to a definite time. The fact that claimant's injury occurred gradually over a period of time as a result of continuing exposure to conditions of employment is no bar to a finding of an injury within the meaning of the Act. **Bath Iron Works Corp. v. White**, 584 F.2d 569 (1st Cir. 1978).

This case presents the classic battle of the medical experts with Dr. Kern and Dr. Powell pitted against Dr. Gee.

Dr. Kern, a noted expert in the field of pulmonary/occupational medicine and who has impressive academic and professional qualifications, testified forthrightly and definitively at his June 28, 2000 deposition (CX 14) and the doctor’s essential thesis is that Decedent’s asbestos exposure while in the U.S. Navy and at the Employer’s shipyard together with his extensive cigarette smoking history of as much as 120 pack-years, the so-called synergistic effect, contributed to the development of his non-small cell lung cancer, based upon the doctor’s review of Decedent’s medical records and the various epidemiologic studies dealing with asbestos-exposed workers and the increased risk of developing asbestosis or other asbestos-

related diseases such as lung cancer. Dr. Kern testified forthrightly as to the biological process involved in inhaling asbestos dust and fibers and their effect upon the various body organs where the fibers are deposited. Dr. Kern then gave detailed testimony about the various studies dealing with this issue, candidly admitting that some studies do not support his ultimate conclusion, **i.e.,** asbestos exposure can result in lung cancer without radiographic evidence of asbestos bodies or fibers in the lungs. However, he did disagree with Dr. Gee who requires a showing of radiographic asbestosis before finding a causal relationship. (Dr. Gee's opinions will be more fully discussed below.) (CX 14 at 3-36)

Dr. Kern continued to express his opinions and he never wavered when cross-examined by Employer's counsel. (**Id.** at 36-48)
I note the doctor's supplemental report dated July 1, 2000. (CX 15)

The parties deposed Stephen Powell, M.D., on October 16, 2000 and the transcript thereof is in evidence as RX 11.

Dr. Steven Powell was the consulting pulmonary physician for Mr. DeWick. Dr. Powell attended medical school at Mt. Sinai in New York and did a residency in internal medicine. (RX 11) He did a fellowship in pulmonary medicine at New York Medical College for two (2) years. (**Id.**) In June of the year 2000, Dr. Powell received an inquiry from Attorney Melissa Olsen enclosing medical records and asking him to comment upon the etiology of DeWick's lung cancer. (**Id.** at 8) The doctor had responded with a letter that stated that it was more likely than not that the employee's exposure to asbestos was a precipitating factor in the development of his lung cancer. (**Id**. at 9; CX 13) Although Attorney Olsen's letter directed the doctor's attention to an opinion regarding DeWick's exposure while in the Navy, he testified that his response was not specific to the Navy or Electric Boat. (**Id**. at 10)His original hospital consultation includes a history that covers both the Navy and Electric Boat exposures. (**Id**.) Furthermore he said there was no way to distinguish whether it was Electric Boat or the Navy exposure which caused the lung cancer. (**Id**. at 10) Dr. Powell agreed that asbestosis is directly associated with exposure to asbestos and when asked whether there was any evidence of asbestos fibers in the lungs, Dr. Powell said that it was impossible to make that determination from the examinations that were done. As with the other doctors, he said that the smoking history alone could be the cause of the employee's lung cancer. (**Id**. at 16) He also acknowledged that exposure to asbestos with a 20 year history in the Navy could have caused the condition. Additionally, the exposure to Electric Boat was a factor in the development of the

disease. (**Id**. at 18) However, the doctor could not quantify that factor. (**Id**.)

Dr. Gee, also a noted pulmonary/occupational specialist with impressive academic and professional qualifications, testified at his April 17, 2000 deposition (RX 7) that he also reviewed Decedent's medical records, that those records show that he died of lung cancer, that his chest x-rays "describe no evidence of pleural plaques and no interstitial lung disease" and that his father also "died of lung cancer." Dr. Gee attributed Decedent's lung cancer solely to his extensive cigarette smoking history of three to four packs per day, thereby resulting in a smoking history of "somewhere between 120 and 160 pack years." According to Dr. Gee, "this gentleman has no evidence biologically of any asbestos effects on lung or pleura. Therefore, **his risk from asbestos is extremely small or even absent."** (Emphasis added) (RX 7 at 3-10)

Dr. Gee also testified about the studies that support his position and termed as obsolete or outdated the studies that did not support his positions (**Id.** at 10-16) and I note that the doctor disputed the well-recognized concept called "synergism." (**Id.** at 15)

In response to intense cross-examination by Claimant's counsel (**Id.** at 16-63), Dr. Gee's opinions became evasive, vague and non-responsive to the questions asked, especially as he had not brought those studies with him and as he kept referring Claimant's counsel to his November 16, 1999 report. (RX 1) Dr. Gee admitted that he did not review the chest x-ray films or the CAT scan films because "(t)here were none provided," that most of his legal work currently is for employers, insurance companies and asbestos manufacturers, that several of the questions he was asked were "obviously semantically correct," that he had not seen any of Decedent's pulmonary function tests, that it would be important for him to know when Decedent began to use bronchodilators for his breathing problems and that he could not really identify, at that time, the three most significant studies that support his position. (**Id.** at 16-30)

Dr. Gee also admitted that high resolution CAT scans have shown a greater incidence of pulmonary fibrosis over ordinary CAT scans and that "radiologists are making an important and useful contribution." (**Id.** at 30-31) The doctor also admitted that only about six percent of lifetime cigarette smokers develop lung cancer. (**Id.** at 3) During the remainder of his deposition the doctor disagreed with those studies that do not support his position. (**Id.** at 36-63)

At the outset, I note that it is clear that Decedent suffered an injury to his lungs and that injury developed into lung cancer from which he died.

In the instant case, the Claimant has presented the testimony of Raymond King, Richard Sapieha, Robert Hutchinson and Michael Haney, all of whom testified that asbestos was present in the workplace from the time Decedent began to work there until as late as the 1980s, according to one of the witnesses. In addition, Decedent himself gave history of exposure to asbestos in both the Navy and at Electric Boat to his treating physicians when he was diagnosed and treated. There is absolutely no evidence that there was no asbestos in the workplace after October of 1976. Therefore, the evidence establishes that working conditions existed that could have caused the harm to Decedent's lungs, and I so find and conclude.

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. The employer has offered a medical expert who testified that asbestos did not play any role in the development of
Decedent's lung cancer and the doctor attributes the lung cancer solely to his smoking, a non-work related factor. As found above, this testimony is sufficient to rebut the presumption. **Phillips v. Newport News Shipbuilding and Drydock Company**, 22 BRBS 94 (1988). Once rebutted, the presumption is no longer in the case and the issue of causation is determined by examining the record as a whole and the Claimant must prove causation by a preponderance of the evidence.

Three doctors have given their opinions in this case. Two doctors have based their opinions at least in part on various studies which have been conducted on the relationship between exposure to asbestos and the development of lung cancer. It is clear that this is a subject of controversy in the literature. However, Dr. Gee's position appears to be extreme and beyond what any of the studies show. He requires a finding of asbestosis based on radiographic information before he will relate a lung cancer to asbestos exposure. While some studies seem to show that asbestosis is a good indicator of heavier asbestos exposure and the incidence of lung cancer is higher in persons who have had heavier exposure, it is not necessarily true that asbestosis must be present in order to have an asbestos related lung cancer. In logic, this would be described as a situation where although A may equal C and B may equal C, that does not mean that A = B. In one study which both Kern and Gee reference, the Sluis-Cremer study, it is clear that the conclusions were drawn based on histological evidence not radiographic evidence. Even though Gee refuses to acknowledge synergism in describing the relationship between asbestos

exposure and smoking, he does say, "It is reasonable to regard asbestos and smoking as "co-conspirators"." (RX 1) This statement certainly implies something beyond two independent factors. Although Gee manages to develop a list of articles which he believes support his position, he does not effectively deal with the other set of studies which do not support his position, other than to say about Dr. Selikoff's report regarding synergism in 1989, that it is no longer valid. Dr. Kern, on the other hand, acknowledges the controversy, talks about the studies which do not necessarily support his position but still finds that the asbestos exposure played a role in the development of Decedent's lung cancer. Likewise, Decedent's treating pulmonary physician finds a causal relationship.

In view of the foregoing, I find and conclude that Decedent's lung cancer resulted from his exposure to asbestos as a maritime employee at the Employer's shipyard, as well as his very extensive cigarette smoking history of as much as 160-pack years and that I have given greater weight to the forthright opinions of Dr. Kern and Dr. Powell as opposed to the vague, evasive, wavering and non-responsive answers of Dr. Gee. While I am impressed with Dr. Gee's professional qualifications, I cannot accept his opinions herein for the reasons expressed above.

I also find and conclude that the Employer had timely notice of the injury and death of the Decedent and that claims for benefits were timely filed once those disputes arose between the parties.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of her husband's disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141

(1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

A loss of wage-earning capacity is not negated by Decedent's retirement on October 20, 1995 as he was unable to work at that time and would have liked to continue working. **MacDonald v. Bethlehem Steel Corp.**, 18 BRBS 181 (1986).

On the basis of the totality of this closed record, I find and conclude that Claimant has established that her husband could not return to work as an STO Technician between October 8, 1995 and October 28, 1995 and after November 5, 1995 and that he took the so-called “golden handshake” because of his pulmonary problems. The burden thus rests upon the Employer to demonstrate the existence of suitable alternative employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Decedent had a total disability for the above-indicated time periods.

Decedent's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th

Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a

permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

The Board has held that an irreversible medical condition is permanent **per se**. **Drake v. General Dynamics Corp.**, 11 BRBS 288 (1979). Lung cancer, in my judgment, is such a condition.

On the basis of the totality of the record, I find and conclude that Decedent was permanently and totally disabled from November 5, 1995, when he finally was forced to discontinue working as a result of his occupational disease, and such disability continued until his death on July 29, 1996.

Death Benefits and Funeral Expenses Under Section 9

Pursuant to the 1984 Amendments to the Act, Section 9 provides Death Benefits to certain survivors and dependents if a work-related injury causes an employee's death. This provision applies with respect to any death occurring after the enactment date of the Amendments, September 28, 1984. 98 Stat. 1655. The provision that Death Benefits are payable only for deaths due to employment injuries is the same as in effect prior to the 1972 Amendments. The carrier at risk at the time of decedent's injury, not at the time of death, is responsible for payment of Death Benefits. **Spence v. Terminal Shipping Co.**, 7 BRBS 128 (1977), **aff'd sub nom. Pennsylvania National Mutual Casualty Insurance Co. v. Spence**, 591 F.2d 985, 9 BRBS 714 (4th Cir. 1979), **cert. denied**, 444 U.S. 963 (1975); **Marshall v. Looney's Sheet Metal Shop**, 10 BRBS 728 (1978), **aff'd sub nom. Travelers Insurance Co. v. Marshall**, 634 F.2d 843, 12 BRBS 922 (5th Cir. 1981).

A separate Section 9 claim must be filed in order to receive benefits under Section 9. **Almeida v. General Dynamics Corp.**, 12 BRBS 901 (1980). This Section 9 claim must comply with Section 13. **See Wilson v. Vecco Concrete Construction Co.**, 16 BRBS 22 (1983); **Stark v. Bethlehem Steel Corp.**, 6 BRBS 600 (1977). Section 9(a) provides for reasonable funeral expenses not exceeding $3,000. 33 U.S.C.A. §909(a) (West 1986). Prior to the 1984 Amendments, this amount was $1,000. This subsection contemplates that payment is to be made to the person or business providing funeral services or as reimbursement for payment for such services, and payment is limited to the actual expenses incurred up to $3,000. Claimant is entitled to appropriate interest on funeral benefits untimely paid. **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78, 84 (1989).

Section 9(b) which provides the formula for computing Death Benefits for surviving spouses and children of Decedents must be read in conjunction with Section 9(e) which provides minimum benefits. **Dunn v. Equitable Equipment Co.**, 8 BRBS 18 (1978); **Lombardo v. Moore-McCormack Lines, Inc.**, 6 BRBS 361 (1977); **Gray v. Ferrary Marine Repairs**, 5 BRBS 532 (1977).

Section 9(e), as amended in 1984, provides a maximum and minimum death benefit level. Prior to the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, the average weekly wage of Decedent could not be greater than $105 nor less than $27, but total weekly compensation could not exceed Decedent's weekly wages. Under the 1972 Amendments, Section 9(e) provided that in computing Death Benefits, Decedent's average weekly wage shall not be less than the National Average Weekly Wage under Section 6(b), but that the weekly death benefits shall not exceed decedent's actual average weekly wage. **See Dennis v. Detroit Harbor Terminals**, 18 BRBS 250 (1986), **aff'd sub nom. Director, OWCP v. Detroit Harbor Terminals, Inc.**, 850 F.2d 283 21 BRBS 85 (CRT) (6th Cir. 1988); **Dunn, supra**; **Lombardo, supra**; **Gray, supra**.

In **Director, OWCP v. Rasmussen**, 440 U.S. 29, 9 BRBS 954 (1979), **aff'g** 567 F.2d 1385, 7 BRBS 403 (9th Cir. 1978), **aff'g sub nom. Rasmussen v. GEO Control, Inc.**, 1 BRBS 378 (1975), the Supreme Court held that the maximum benefit level of Section 6(b)(1) did not apply to Death Benefits, as the deletion of a maximum level in the 1972 Amendment was not inadvertent. The Court affirmed an award of $532 per week, two-thirds of the employee's $798 average weekly wage.

However, the 1984 amendments have reinstated that maximum limitation and Section 9(e) currently provides that average weekly wage shall not be less than the National Average Weekly

Wage, but benefits may not exceed the lesser of the average weekly wage of Decedent or the benefits under Section 6(b)(1).

In view of these well-settled principles of law, I find and conclude that Claimant, as the surviving Widow of Decedent, is entitled to an award of Death Benefits, commencing on July 30, 1996, the day after her husband's death, based upon the Decedent's average weekly wage $790.84 as of that date, pursuant to Section 9, as I find and conclude that Decedent's death resulted from a combination of his work-related pulmonary asbestosis and his lung cancer. Thus, I find and conclude that Decedent's death resulted from and was related to his work-related injury for which his estate will be receiving permanent total disability benefits from October 20, 1995 until his death on July 29, 1996.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

The Benefits Review Board has held that the employer must pay appropriate interest on untimely paid funeral benefits as funeral expenses are "compensation" under the Act. **Adams v. Newport News Shipbuilding**, 22 BRBS 78, 84 (1989).

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Employer timely controverted the entitlement to benefits by the Claimant and Decedent. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own

initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury in a timely manner and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, the Employer is responsible for the reasonable, necessary and appropriate medical care and treatment relating to his work-related injury, commencing on September 29, 1995 (CX 1-4), at which time he was hospitalized to evaluate his breathing problems, subject to the provisions of Section 7 of the Act.

Section 8(f) of the Act

Regarding the Section 8(f) issue, the essential elements of that provision are met, and employer's liability is limited to one hundred and four (104) weeks, if the record establishes that (1) the employee had a pre-existing permanent partial disability, (2) which was manifest to the employer prior to the subsequent compensable injury and (3) which combined with the subsequent injury to produce or increase the employee's permanent total or partial disability, a disability greater than

that resulting from the first injury alone. **Lawson v. Suwanee Fruit and Steamship Co.**, 336 U.S. 198 (1949); **Director, OWCP v. Luccitelli**, 964 F.2d 1303, 26 BRBS 1 (CRT) (2d Cir. 1992), **rev'g Luccitelli v. General Dynamics Corp.**, 25 BRBS 30 (1991); **Director, OWCP v. General Dynamics Corp.**, 982 F.2d 790 (2d Cir. 1992); **FMC Corporation v. Director, OWCP**, 886 F.2d 1185, 23 BRBS 1 (CRT) (9th Cir. 1989); **Director, OWCP v. Cargill, Inc.**, 709 F.2d 616 (9th Cir. 1983); **Director, OWCP v. Newport News & Shipbuilding & Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982); **Director, OWCP v. Sun Shipbuilding & Dry Dock Co.**, 600 F.2d 440 (3rd Cir. 1979); **C & P Telephone v. Director, OWCP**, 564 F.2d 503 (D.C. Cir. 1977); **Equitable Equipment Co. v. Hardy**, 558 F.2d 1192 (5th Cir. 1977); **Shaw v. Todd Pacific Shipyards**, 23 BRBS 96 (1989); **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **McDuffie v. Eller and Co.**, 10 BRBS 685 (1979); **Reed v. Lockheed Shipbuilding & Construction Co.**, 8 BRBS 399 (1978); **Nobles v. Children's Hospital**, 8 BRBS 13 (1978). The provisions of Section 8(f) are to be liberally construed. **See Director v. Todd Shipyard Corporation**, 625 F.2d 317 (9th Cir. 1980). The benefit of Section 8(f) is not denied an employer simply because the new injury merely aggravates an existing disability rather than creating a separate disability unrelated to the existing disability. **Director, OWCP v. General Dynamics Corp.**, 705 F.2d 562, 15 BRBS 30 (CRT) (1st Cir. 1983); **Kooley v. Marine Industries Northwest**, 22 BRBS 142, 147 (1989); **Benoit v. General Dynamics Corp.**, 6 BRBS 762 (1977).

The employer need not have actual knowledge of the pre-existing condition. Instead, "the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it." **Dillingham Corp. v. Massey**, 505 F.2d 1126, 1228 (9th Cir. 1974). Evidence of access to or the existence of medical records suffices to establish the employer was aware of the pre-existing condition. **Director v. Universal Terminal & Stevedoring Corp.**, 575 F.2d 452 (3d Cir. 1978); **Berkstresser v. Washington Metropolitan Area Transit Authority**, 22 BRBS 280 (1989), **rev'd and remanded on other grounds sub nom. Director v. Berkstresser, 921 F.2d 306 (D.C. Cir. 1990)**; **Reiche v. Tracor Marine, Inc.**, 16 BRBS 272, 276 (1984); **Harris v. Lambert's Point Docks, Inc.**, 15 BRBS 33 (1982), **aff'd**, 718 F.2d 644 (4th Cir. 1983). **Delinski v. Brandt Airflex Corp.**, 9 BRBS 206 (1978). Moreover, there must be information available which alerts the employer to the existence of a medical condition. **Eymard & Sons Shipyard v. Smith**, 862 F.2d 1220, 22 BRBS 11 (CRT) (5th Cir. 1989); **Armstrong v. General Dynamics Corp.**, 22 BRBS 276 (1989); **Berkstresser**, **supra**, at 283; **Villasenor v. Marine Maintenance Industries**, 17 BRBS 99, 103 (1985); **Hitt v. Newport News Shipbuilding and Dry Dock Co.**, 16 BRBS 353 (1984); **Musgrove v.**

William E. Campbell Company, 14 BRBS 762 (1982). A disability will be found to be manifest if it is "objectively determinable" from medical records kept by a hospital or treating physician. **Falcone v. General Dynamics Corp.**, 16 BRBS 202, 203 (1984). Prior to the compensable second injury, there must be a medically cognizable physical ailment. **Dugan v. Todd Shipyards**, 22 BRBS 42 (1989); **Brogden v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 259 (1984); **Falcone**, **supra**.

The pre-existing permanent partial disability need not be economically disabling. **Director, OWCP v. Campbell Industries**, 678 F.2d 836, 14 BRBS 974 (9th Cir. 1982), **cert. denied**, 459 U.S. 1104 (1983); **Equitable Equipment Company v. Hardy**, 558 F.2d 1192, 6 BRBS 666 (5th Cir. 1977); **Atlantic & Gulf Stevedores v. Director, OWCP**, 542 F.2D 602 (3d Cir. 1976).

An x-ray showing pleural thickening, followed by continued exposure to the injurious stimuli, establishes a pre-existing permanent partial disability. **Topping v. Newport News Shipbuilding**, 16 BRBS 40 (1983); **Musgrove v. William E. Campbell Co.**, 14 BRBS 762 (1982).

Section 8(f) relief is not applicable where the permanent total disability is due solely to the second injury. In this regard, **see Director, OWCP (Bergeron) v. General Dynamics Corp.**, 982 F.2d 790, 26 BRBS 139 (CRT)(2d Cir. 1992); **Luccitelli v. General Dynamics Corp.**, 964 F.2d 1303, 26 BRBS 1 (CRT)(2d Cir. 1992); **CNA Insurance Company v. Legrow**, 935 F.2d 430, 24 BRBS 202 (CRT)(1st Cir. 1991) In addressing the contribution element of Section 8(f), the United States Court of Appeals for the Second Circuit, in whose jurisdiction the instant case arises, has specifically stated that the employer's burden of establishing that a claimant's subsequent injury alone would not have cause claimant's permanent total disability is not satisfied merely by showing that the pre-existing condition made the disability worse than it would have been with only the subsequent injury. **See Director, OWCP v. General Dynamics Corp. (Bergeron), supra.**

Even in cases where Section 8(f) is applicable, the Special Fund is not liable for medical benefits. **Barclift v. Newport News Shipbuilding & Dry Dock Co.**, 15 BRBS 418 (1983), **rev'd on other grounds sub nom. Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.**, 737 F.2d 1295 (4th Cir. 1984); **Scott v. Rowe Machine Works**, 9 BRBS 198 (1978); **Spencer v. Bethlehem Steel Corp.**, 7 BRBS 675 (1978).

Section 8(f) relief is not available to the employer simply because it is the responsible employer or carrier under the last employer rule promulgated in **Travelers Insurance Co. v.**

Cardillo, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey Co. v. Cardillo**, 350 U.S. 913 (1955). The three-fold requirements of Section 8(f) must still be met. **Stokes v. Jacksonville Shipyards, Inc.**, 18 BRBS 237, 239 (1986), **aff'd sub nom. Jacksonville Shipyards, Inc. v. Director**, 851 F.2d 1314, 21 BRBS 150 (CRT) (11th Cir. 1988).

In **Huneycutt v. Newport News Shipbuilding & Dry Dock Co.**, 17 BRBS 142 (1985), the Board held that where permanent partial disability is followed by permanent total disability and Section 8(f) is applicable to both periods of disability, employer is liable for only one period of 104 weeks. In **Huneycutt**, the claimant was permanently partially disabled due to asbestosis and then became permanently totally disabled due to the same asbestosis condition, which had been further aggravated and had worsened. Thus, in **Davenport v. Apex Decorating Co.**, 18 BRBS 194 (1986), the Board applied **Huneycutt** to a case involving permanent partial disability for a hip problem arising out of a 1971 injury and a subsequent permanent total disability for the same 1971 injury. **See also Hickman v. Universal Maritime Service Corp.**, 22 BRBS 212 (1989); **Adams v. Newport News Shipbuilding and Dry Dock Company**, 22 BRBS 78 (1989); **Henry v. George Hyman Construction Company**, 21 BRBS 329 (1988); **Bingham v. General Dynamics Corp.**, 20 BRBS 198 (1988); **Sawyer v. Newport News Shipbuilding and Dry Dock Co.**, 15 BRBS 270 (1982); **Graziano v. General Dynamics Corp.**, 14 BRBS 950 (1982) (where the Board held that where a total permanent disability is found to be compensable under Section 8(a), with the employer's liability limited by Section 8(f) to 104 weeks of compensation, the employer will not be liable for an additional 104 weeks of death benefits pursuant to Section 9 where the death is related to the injury compensated under Section 8 as both claims arose from the same injury which, in combination with a pre-existing disability resulted in total disability and death); **Cabe v. Newport News Shipbuilding and Dry Dock Co.**, 13 BRBS 1029 (1981); **Adams**, **supra**.

However, the Board did not apply **Huneycutt** in **Cooper v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 284, 286 (1986), where claimant's permanent partial disability award was for asbestosis and his subsequent permanent total disability award was precipitated by a totally new injury, a back injury, which was unrelated to the occupational disease. While it is consistent with the Act to assess employer for only one 104 week period of liability for all disabilities arising out of the same injury or occupational disease, employer's liability should not be so limited when the subsequent total disability is caused by a new distinct traumatic injury. In such a case, a new claim for a new injury must be filed and new periods should be

assessed under the specific language of Section 8(f). **Cooper**, **supra**, at 286.

However, employer's liability is not limited pursuant to Section 8(f) where claimant's disability did not result from the combination or coalescence of a prior injury with a subsequent one. **Two "R" Drilling Co. v. Director, OWCP**, 894 F.2d 748, 23 BRBS 34 (CRT) (5th Cir. 1990); **Duncanson-Harrelson Company v. Director, OWCP and Hed and Hatchett**, 644 F.2d 827 (9th Cir. 1981). Moreover, the employer has the burden of proving that the three requirements of the Act have been satisfied. **Director, OWCP v. Newport News Shipbuilding and Dry Dock Co.**, 676 F.2d 110 (4th Cir. 1982). Mere existence of a prior injury does not, **ipso facto**, establish a pre-existing disability for purposes of Section 8(f). **American Ship-building v. Director, OWCP**, 865 F.2d 727, 22 BRBS 15 (CRT) (6th Cir. 1989). Furthermore, the phrase "existing permanent partial disability" of Section 8(f) was not intended to include habits which have a medical connection, such as a bad diet, lack of exercise, drinking (but not to the level of alcoholism) or smoking. **Sacchetti v. General Dynamics Corp.**, 14 BRBS 29, 35 (1981); **aff'd**, 681 F.2d 37 (1st Cir. 1982). Thus, there must be some pre-existing physical or mental impairment, **viz**, a defect in the human frame, such as alcoholism, diabetes mellitus, labile hypertension, cardiac arrhythmia, anxiety neurosis or bronchial problems. **Director, OWCP v. Pepco**, 607 F.2d 1378 (D.C. Cir. 1979), **aff'g**, 6 BRBS 527 (1977); **Atlantic & Gulf Stevedores, Inc. v. Director, OWCP**, 542 F.2d 602 (3d Cir. 1976); **Parent v. Duluth Missabe & Iron Range Railway Co.**, 7 BRBS 41 (1977). As was succinctly stated by the First Circuit Court of Appeals, ". . . smoking cannot become a qualifying disability [for purposes of Section 8(f)] until it results in medically cognizable symptoms that physically impair the employee. **Sacchetti**, **supra**, at 681 F.2d 37.

On the basis of the totality of the record, I find and conclude that the Employer has not satisfied these requirements because the record reflects that Decedent died as a result of his lung cancer, a fatal disease per se. (RX 6A) I note that the Death Certificate identifies no other condition as contributing to death. Decedent’s smoking history, in my judgment, does not constitute a pre-existing permanent partial disability for Section 8(f) purposes.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer or Carrier (Respondents). Claimant's attorney has not submitted his/her fee application. Within thirty (30) days of the receipt

of this Decision and Order, he/she shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's Respondents' counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after the informal conference. Services performed prior to that date should be submitted to the District Director for her consideration.

Responsible Employer

The Employer as a self-insurer is the party responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. **See Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

The Benefits Review Board has held that minimal exposure to some asbestos, even without distinct aggravation, is sufficient to trigger application of the **Cardillo** rule. **Grace v. Bath Iron Works Corp.**, 21 BRBS 244 (1988); **Lustig v. Todd Shipyards Corp.**, 20 BRBS 207 (1988); **Proffitt v. E.J. Bartells Co.**, 10 BRBS 435 (1979) (two days' exposure to the injurious stimuli satisfies **Cardillo**). **Compare Todd Pacific Shipyards Corporation v. Director, OWCP**, 914 F.2d 1317 (9th Cir. 1990), **rev'g Picinich v. Lockheed Shipbuilding**, 22 BRBS 289 (1989).

As this Court has no jurisdiction over the U.S. Navy and as the Employer was the last maritime employer to expose Decedent to asbestos, the Employer is responsible for all of the benefits awarded herein.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer, as a self-insurer, shall pay to the Decedent's estate compensation for his temporary total disability from October 8, 1995 through October 28, 1995, based upon an average weekly wage of $790.84, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on November 5, 1995, and continuing until July 29, 1996, the Employer shall pay to the Decedent's estate compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon an average weekly wage of $790.84, such compensation to be computed in accordance with Section 8(a) of the Act.

3. The Employer shall pay Decedent's widow, Joan M. DeWick, ("Claimant"), Death Benefits from July 30, 1996, based upon the Decedent's average weekly wage of $790.84, in accordance with Section 9 of the Act, and such benefits shall continue for as long as she is eligible therefor.

4. The Employer shall reimburse or pay Claimant reasonable funeral expenses of $3,000.00, pursuant to Section 9(a) of the Act.
(CX 12)

5. Interest shall be paid by the Employer on all accrued benefits at the T-bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director. Interest shall also be paid on the funeral benefits untimely paid by the Employer.

6. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, even after the

time period specified in the fifth Order provision above commencing on September 29, 1995 CX 1-4), subject to the provisions of Section 7 of the Act.

7. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference on December 15, 1999.

DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:dsr